RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FORMER OFFICIALS OF THE U.S. DEPARTMENT OF EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. Department of Education officials responsible for special education policy.

Amicus Dr. Thomas Hehir is the Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education. Dr. Hehir served as the Director of the Office of Special Education Programs under President William J. Clinton and has extensive experience implementing school district-level special education plans with the Chicago and Boston public school systems.

Amicus Stephanie Smith Lee served as the Director of the Office of Special Education Programs under President George W. Bush from 2002 to 2005. She has more than 35 years of experience in disability, education, and employment policy, including serving in senior legislative staff positions for Members of the U.S. House of Representatives and the U.S. Senate and for the U.S. Senate Health, Education, Labor, and Pensions Committee. She has served as a Senate Republican Majority Leader appointee to the Ticket to Work and Work Incentives Advisory Panel, as a member of former Virginia Governor George Allen's Champion Schools Commission, and on other commissions. Since her daughter, Laura, was born with Down syndrome in 1982, Ms. Lee has organized and led many successful bipartisan, collaborative

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

efforts to improve special education and disability policy in Virginia and at the national level. She is currently the Postsecondary Education Consultant to the National Down Syndrome Congress and Chair of the National Coordinating Center Accreditation Workgroup, which is developing model accreditation program standards for higher education programs for students with intellectual disabilities.

Amicus Dr. Melody B. Musgrove is Co-Director of the Graduate Center for the Study of Early Learning and Associate Professor of Special Education at the University of Mississippi. Dr. Musgrove served as the Director of the Office of Special Education Programs under President Barack Obama and previously served as a classroom teacher, school administrator, district special education director, assistant superintendent, and State Director of Special Education for the Mississippi Department of Education.

Amicus Dr. Robert Pasternack currently serves as the Chief Executive Officer for Ensenar Educational Services, Inc. providing consultation to School Districts, State Departments of Education, and an array of companies serving Students with Disabilities across country. Dr. Pasternack also serves as the Chief Education Officer for Accelify, adding to his consultation with the aforementioned entities throughout the country. Dr. Pasternack served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President George W. Bush, and in that capacity worked on the 2004 Reauthorization of IDEA. He served on the President's Commission on Excellence in Special Education; President's Mental Health Commission; and led the Federal Interagency Coordinating Committee during his tenure. During his 45 years in education, Dr. Pasternack has been a classroom teacher, Superintendent, and State Director of Special Education.

As the guardian for his brother with Down Syndrome, he has been an advocate for improving outcomes and results for Students with Disabilities and their families. Dr. Pasternack is a Nationally Certified School Psychologist, certified teacher, administrator, and educational diagnostician.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

Amicus Michael Yudin served as both the Assistant Secretary of the Office of Special Education and Rehabilitative Services and the Acting Assistant Secretary of the Office of Elementary and Secondary Education under President Barack Obama. In these capacities, Mr. Yudin helped implement both the Individuals with Disabilities Education Act ("IDEA") and the Elementary and Secondary Education Act of

1965, as amended. Prior to his work at the Department of Education, Mr. Yudin spent nine years in the United States Senate, where he worked for senior members of the Senate Health, Education, Labor, and Pensions Committee on education legislation, including the IDEA reauthorization of 2004 and the No Child Left Behind Act of 2001. With more than 25 years of experience in the executive and legislative branches of the federal government, Mr. Yudin has dedicated his career to advocating on behalf of educationally disadvantaged students and individuals with disabilities.

Amici have devoted their professional lives to working for the interests of students with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families. Having been involved in the implementation of the federal statutes at issue in this case, and having led the Department's support of peer-reviewed research into effective approaches to educating students with disabilities, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

Amici believe that the Tenth Circuit's "more-than-de-minimis" standard for evaluating the substantive adequacy of the "free appropriate public education" required under the IDEA is contrary to the terms of the statute and to this Court's precedent. Furthermore, the lower court's standard reflects a basic misconception regarding the efficacy of educational methods, behavioral interventions, and assistive technologies that allow students with disabilities to reach levels of achievement and proficiency comparable to all students. This brief seeks to provide a description

of these research-validated approaches and to explain that they offer an opportunity for students with disabilities to meet the State's generally applicable academic standards and to prepare them for post-secondary education, employment, and independent living, enabling them to become productive and contributing adults.

SUMMARY OF ARGUMENT

Over the decades since the Individuals with Disabilities Education Act ("IDEA") was first enacted, extensive research and practical experience have fostered the development of improved teaching methods, educational technology, and behavioral interventions that have improved the efficacy of education for millions of students with disabilities. It is thus both appropriate and realistic to set high expectations and high achievement goals for students with disabilities. Standardized test scores and other educational statistics show that progress is not only possible but happening now.

Students with disabilities have shown substantial gains in a variety of educational success metrics, though an achievement gap still persists between students with disabilities and their non-disabled peers. The achievement gap is being narrowed with the application of current research, most of which is sponsored by the Department of Education ("the Department"), showing how students with disabilities learn. That research, in turn, is informing the approaches and technologies used in the classroom. Intervention plans, behavioral-support strategies, and individualized approaches to teaching and learning, among other innovations in teaching, are showing documented results. Behavioral intervention strategies for students with autism spectrum disorder ("ASD"), such as petitioner here, also have shown that

students with ASD can thrive and achieve proficiency in the general education curriculum.

The proven effectiveness of these educational techniques should inform this Court's interpretation of the IDEA's central guarantee of a "free appropriate public education" ("FAPE") for all students, including students with disabilities. This Court last addressed the meaning of a "free appropriate public education" in 1982, *see Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), but the FAPE standard is not static or tied to teaching methods and expected educational outcomes from decades past. Rather, the FAPE standard must reflect current, and increasingly advancing, teaching methods and the same high expectations for students with disabilities that we have for all students.

Since this Court decided *Rowley* more than 30 years ago, federal education law has changed to keep pace with emerging knowledge and developments in educational praxis. In particular, in 1997 and 2004, Congress amended the IDEA to require public schools to set measurable goals in providing students with disabilities with access to – and enable them to be involved in and make progress in – the general education curriculum. These changes incorporate the standards-based reforms to public education advanced in the Elementary and Secondary Education Act of 1965 ("ESEA") and its reauthorization under the No Child Left Behind Act of 2001 ("NCLB"). Through these laws and associated regulations, Congress and the Department now recognize that we should reject the soft bigotry of low expectations and expect all children, including children with disabilities, to achieve academic success and leave school prepared for college or other postsecondary education, a career, and independence.

ARGUMENT

I. EDUCATION METHODS IN THE SPECIAL EDUCATION CONTEXT HAVE VASTLY IMPROVED SINCE *ROWLEY*

Since this Court decided *Rowley*, educators have developed and implemented more sophisticated methods of supporting the millions of students with disabilities to meet the high expectations that federal law has established for all children. These developments appropriately inform the courts' understanding of the meaning of an *appropriate* education for students with disabilities. No one would question that "appropriate" treatment for tuberculosis changed dramatically with the development of antibiotics. Given the improvements in teaching methods and assistive technologies, it is realistic and therefore appropriate to set high expectations and high achievement goals for students with disabilities.

A. Since *Rowley*, the Achievement Gap Has Narrowed, Although Students with Disabilities Still Lag Behind Non-Disabled Peers in Academic Achievement Metrics

Educational achievement metrics illustrate both the need for and promise of the IDEA. On the one hand, students with disabilities are reaching unprecedented levels of success.[2] The gap between the achievement of students with disabilities and students without disabilities is narrowing as public schools implement evidence-based approaches to

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[2] *See* American Institutes for Research, College & Career Readiness & Success Ctr., *Improving College and Career Readiness for Students with Disabilities* 2-3 (Mar. 2013) ("AIR, *Improving College and Career Readiness*"), http://www.ccrscenter.org/sites/default/files/Improving%20College%20and%20Career%20Readiness%20for%20Students%20with%20Disabilities.pdf.

supporting students with disabilities. At the same time, however, there is still a gap. When expectations for children with disabilities are set too low, they often receive less challenging instruction that reflects below-grade-level content standards, preventing them from learning what they need to learn to succeed at grade-level work. The effects of these low expectations are visible in academic achievement metrics.

Each year, millions of children with a variety of disabilities receive special education and services under the IDEA.[3] In 2014, more than seven million children received IDEA services.[4] Nearly six million were aged six to 21; this represents 8.7% of all such school-aged students.[5] The achievement gap between students with disabilities and other students persists across a variety of subject areas. In 2015,

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[3] A student may be found eligible for IDEA services because the student has an intellectual disability; is deaf or hard of hearing; has a speech or language impairment; a visual impairment, including blindness; an emotional disturbance; orthopedic impairments; an autism spectrum disorder ("ASD"); traumatic brain injury; other health impairments; specific learning disabilities; one or more developmental delays; or multiple disabilities. *See* 20 U.S.C. § 1401(3).

[4] *See* U.S. Dep't of Educ., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016*, at xxi-xxiv (Oct. 2016), http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf. Among students age six through 21, the most prevalent disability category was specific learning disabilities (39.2%), followed by speech or language impairments (17.6%), other health impairments (14.4%), ASD (8.6%), intellectual disability (7%), and emotional disturbance (5.9%); the incidence of ASD within this population increased by 100% between 2005 and 2014. *See id.* at xxiv-xxv, 37 & Ex. 20.

[5] *See id.* at xxiv.

on the National Assessment of Educational Progress ("NAEP"), the average reading score of twelfth-grade students with disabilities was almost 40 points lower (on a 500-point scale) than their counterparts without disabilities.[6] Similarly, the average mathematics score of twelfth-grade students with disabilities was more than 35 points lower than that of students without disabilities.[7]

Between 1990 and 2005, the percentage of students with disabilities who completed high school saw dramatic improvement – from 43% to 61%.[8] But the graduation rate for students with disabilities still lags well behind the average graduation rate for all students, which was 75.5% in 2009. (Since 2009, although graduation rates have continued to improve, the gap has widened: in the 2014-15 school year, the graduation rate for students with disabilities increased to 64.6%, while the graduation rate for all students reached 83.2%.[9])

Enrollment in postsecondary education tells a similar story: students with disabilities have made real and substantial gains, though they still lag behind their non-disabled peers. Between 1990 and 2005, the percentage of students with disabilities

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[6] *See* Nat'l Ctr. for Educ. Statistics, The Nation's Report Card: 2015 Mathematics & Reading at Grade 12, http://www.nationsreportcard.gov/reading_math_g12_2015/#reading/groups (last visited Nov. 17, 2016).

[7] *See id.*

[8] *See* AIR, *Improving College and Career Readiness*, *supra* note 2, at 2-3.

[9] *See* U.S. Dep't of Educ., ED Data Express: Data about elementary & secondary schools in the U.S., National Snapshot, http://eddataexpress.ed.gov/state-report.cfm?state=US&submit.x=42&submit.y=14 (last visited Nov. 17, 2016).

enrolling in any postsecondary program within four years of finishing high school has nearly doubled: from 26.3% to 45.6%.[10] The enrollment percentage for all students, meanwhile, grew from 54% to 62.6%.[11]

In some postsecondary settings, students with disabilities are now graduating at rates approaching and even exceeding general education students. For two-year college programs, for example, students with disabilities complete their programs at a rate of 41.3% compared to 22.4% of general population students.[12] For vocational, business, or technical programs, students with disabilities complete their programs at a rate of 56.7%, nearly as high as the 64.5% rate for all students.[13]

Yet, despite this progress, only 7.6% of students with disabilities attended four-year universities, compared with 29.2% of all students.[14] And, among those who enroll in four-year colleges, students with disabilities graduate less often: 34.2% versus 51.2% for all students.[15]

B. The Achievement Gap Is Narrowing As Schools Across the Country Implement Evidence-Based Teaching Methods

As the progress already achieved demonstrates, public schools are narrowing the achievement gap – an achievement gap that reflects in part the burden

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[10] *See* AIR, *Improving College and Career Readiness*, *supra* note 2, at 2.

[11] *See id.*

[12] *See id.* at 3.

[13] *See id.*

[14] *See id.*

[15] *See id.*

of low expectations for students with disabilities – by applying research-driven advances in educators' understanding about how students with disabilities learn.[16] That improved and improving understanding, in turn, informs the approaches and technologies commonly used in special education instruction and services today.[17]

1. Public schools regularly implement a multi-tiered systems of support to meet the academic and behavioral needs of all students, including students with disabilities.[18]

Using this approach, sometimes called Response to Intervention ("RTI"), schools provide high quality

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[16] The Department of Education funds such research through its National Center for Special Education Research, http://www.ies.ed.gov/ncser/.

[17] *See, e.g.*, Thomas E. Scruggs et al., *Do Special Education Interventions Improve Learning of Secondary Content? A Meta-Analysis*, 31 Remedial & Special Educ. 437-49 (2010) ("Scruggs") (meta-analysis of 70 independent studies investigating effects of special education interventions on student achievement found that students with disabilities made significant progress across different content areas and across different educational settings when they received systematic, explicit instruction; learning strategy instruction; and other evidence-based instructional strategies and supports), *cited in* Final Rule, *Improving the Academic Achievement of the Disadvantaged: Assistance to States for the Education of Children With Disabilities*, 80 Fed. Reg. 50,773, 50,774 (Aug. 21, 2015).

[18] *See* OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions"), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

core instruction that meets the needs of most students.[19] After identifying students who need additional support, including students with disabilities, schools provide evidence-based interventions of moderate to high intensity to address the individual learning challenges of each student.[20]

For example, public schools may employ intensive interventions to teach children with learning disabilities in reading, writing, and math. Such interventions are characterized by small group or one-on-one instruction, which can occur daily. These interventions feature explicit, systematic instruction address-

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[19] *See* U.S. Dep't of Educ., Office of Special Educ. Programs, A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA) at 2 (Jan. 21, 2011) ("OSEP Response") ("[m]any [school districts] have implemented successful RTI strategies"; among the core characteristics of such approaches is "high quality research-based instruction in [the] general education setting"), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf. *See generally* U.S. Dep't of Educ., Office of Special Educ. Programs, IDEAs That Work: Tiered Support, https://ccrs.osepideasthatwork.org/teachers-academic/tiered-support (last visited Nov. 17, 2016).

[20] *See, e.g.*, American Institutes for Research, Ctr. on Response to Intervention, RTI Glossary of Terms ("MTSS allows for the early identification of learning and behavioral challenges and timely intervention for students who are at risk for poor learning outcomes."), http://www.rti4success.org/resources/rti-glossary-terms#MTSS (last visited Nov. 17, 2016); OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions"), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

ing critical elements associated with success – such as, for reading, concepts about print conventions, phonemic awareness, phonics, and fluency.[21] Schools adjust the intensity and nature of interventions depending on the student's responsiveness. Studies show that students with disabilities engaged in such interventions regularly show academic gains.[22] Schools screen students to determine which students need additional interventions; continually monitor the progress of all students; and make decisions

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[21] *See also Scruggs*, *supra* note 17 (examining evidence base for using mnemonic strategies, spatial organizers, classroom learning strategies, computer-assisted instruction, peer mediation, study aids, activity-oriented learning, and explicit instruction in teaching middle school and high school students with disabilities, and finding mean effect sizes indicating that the strategies had a large impact); Council for Exceptional Children, Div. for Learning Disabilities, *Intensive Interventions for Students With Learning Disabilities in the RTI Era* at 1 (Feb. 2014), http://s3.amazonaws.com/cmi-teaching-ld/assets/attachments/180/DLD_PP_1_IntensiveInst-2014.pdf?1395418397.

[22] *See Scruggs*, *supra* note 17; *see also* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *Investment in Reading Research from Kindergarten through High School* at 1 (Oct. 2015) ("*Investment in Reading Research*"), https://ies.ed.gov/ncser/pdf/Reading_2015.pdf; U.S. Dep't of Educ., Inst. of Educ. Sciences, *Synthesis of IES-Funded Research on Mathematics: 2002-2013* (July 2016), http://ies.ed.gov/ncer/pubs/20162003/pdf/20162003.pdf; U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *What Have We Funded? A Summary of Mathematics Research* (Oct. 2015) ("*What Have We Funded?*"), https://ies.ed.gov/ncser/pdf/Math_2015.pdf. Citing a number of studies, the Department has noted that "low-achieving students with disabilities who struggle in reading and low-achieving students with disabilities who struggle in mathematics can successfully learn grade-level content when they have access to high-quality instruction." 80 Fed. Reg. at 50,777 (footnotes omitted).

about the effectiveness of both core instruction and targeted interventions based on student data.[23]

Public schools also implement supports for student behavior. Systems of behavioral supports such as schoolwide positive behavioral interventions and supports ("PBIS") involve setting universal behavioral expectations, and then using data to determine which students need additional behavioral supports.[24] Schools may employ more intensive strategies for groups of students who are exhibiting at-risk behaviors, and individualized services for students who continue to exhibit problematic behavior.[25] Research has shown that successful implementation of schoolwide PBIS

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[23] *See, e.g.*, OSEP Response, *supra* note 19, at 1-2.

[24] *See* OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Tier 3 Supports ("Positive behavior intervention and support is an application of a behaviorally-based systems approach . . . . Attention is focused on creating and sustaining Tier 1 (universal for ALL students), Tier 2 (targeted group support for SOME students), and Tier 3 (individual support for a FEW students) systems of support that improve lifestyle results (personal, health, social, family, work, recreation) for all children and youth by making problem behavior less effective, efficient, and relevant, and desired behavior more functional."), http://www.pbis.org/school/tier3supports (last visited Nov. 17, 2016); *id.*, Multi-tiered System of Support (MTSS) & PBIS ("Positive Behavioral Interventions and Supports (PBIS) is a process that is consistent with the core principles of MTSS."), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

[25] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, *Effective Evidence-based Practices for Preventing and Addressing Bullying* at 2 (Enclosure to Aug. 20, 2013 Dear Colleague Letter on Bullying), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf.

can be linked to improved academic outcomes among students.[26]

Such systems of instructional and behavioral supports effectively engages and supports all students in the school, including those with disabilities.[27]

2. Schools, including those that provide instructional and behavioral supports, are also guided by the principles of Universal Design for Learning ("UDL"), which focuses on individualizing approaches to teaching and learning.[28]

These principles acknowledge that all students, including students with disabilities, differ in how they comprehend information; how they express what they know; and how they are engaged in instruction.[29] In implementing UDL, teachers address the

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[26] *See* U.S. Dep't of Educ., Inst. of Educ. Sciences, *A Compendium of Social-Behavioral Research Funded by NCER and NCSER: 2002-2013*, at 99 (2016), http://ies.ed.gov/ncer/pubs/20162002/pdf/20162002.pdf.

[27] *See* Schoolwide Integrated Framework for Transformation, SWIFT Guide: Inclusive Academic Instruction ("Schools use multi-tiered instructional strategies [and] differentiation . . . to support instruction [for] all students, including those with the most extensive support needs. Academic and behavior supports are integrated within one multi-tiered system of support."), http://guide.swiftschools.org/multi-tiered-system-of-support/inclusive-academic-instruction (last visited Nov. 17, 2016).

[28] *See* Massachusetts Dep't of Elementary & Secondary Educ., The Massachusetts Tiered System of Supports (MTSS) (last updated Oct. 11, 2011) (explaining that schools implementing MTSS are guided by UDL principles), http://www.doe.mass.edu/sped/mtss.html (last visited Nov. 17, 2016); Nat'l Ctr. on Universal Design for Learning, What is UDL?, http://www.udlcenter.org/aboutudl/whatisudl (last visited Nov. 17, 2016).

[29] *See* Nat'l Ctr. on Universal Design for Learning, The Three Principles of UDL, http://www.udlcenter.org/aboutudl/whatisudl/3principles (last visited Nov. 17, 2016).

variability of student learning by implementing flexible goals, methods, materials, and assessments. Curriculum is customizable, and instruction is differentiated.[30]

UDL is an evidence-based strategy for implementing inclusive practice, meaning students with disabilities are included in classrooms with students without disabilities.[31] The Department has found that students with disabilities who spend most of their time in general education classes have higher test scores in reading and mathematics than students who spend most of their time in separate schools and classes.[32] The Department has also found that

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[30] *See* What is UDL?, *supra* note 28. Congress recognized the success of UDL as an approach to helping all students achieve proficiency, including students with disabilities, in the Every Student Succeeds Act of 2015 ("ESSA"), which reauthorized the ESEA and which requires States to develop academic assessments consistent with UDL, *see* 20 U.S.C. § 6311(b)(2)(B)(xiii), (b)(2)(D)(i)(IV), and requires schools providing federally funded comprehensive literacy instruction to incorporate UDL in the instruction, *see id.* § 6311(b)(2)(J). The ESSA takes its definition of UDL from that in the Higher Education Act of 1965, *see id.* § 1003(24) (defining UDL as "a scientifically valid framework for guiding educational practice that . . . provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and . . . reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities").

[31] *See, e.g.*, Massachusetts Dep't of Elementary & Secondary Educ., *Inclusive Practice in Massachusetts: Teacher preparation program overview of evidence-based best practices*, http://www.doe.mass.edu/edeval/guidebook/edprep/InclusivePractice.pdf (last visited Nov. 17, 2016).

[32] *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal*

inclusion is associated with better postsecondary outcomes, including in employment, postsecondary education, and income.[33] Children with significant disabilities are now being included in general education settings in every State and school district in the country.

3. Educators now have many highly effective interventions that can help every student meet the state academic standards that apply to all students.[34] Teams developing individualized education programs ("IEPs") in public schools nationwide prescribe such interventions to students with disabilities as needed

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Study (SEELS) 24 (June 2004), http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf; Jose Blackorby et al., *What Makes a Difference? Influences on Outcomes for Students with Disabilities* 7-7 (Feb. 2007), http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf.

[33] *See* Mary Wagner et al., *What Makes a Difference? Influences on Postschool Outcomes of Youth with Disabilities: The Third Comprehensive Report from the National Longitudinal Transition Study of Special Education Students* 4-8 to 4-9 & Table 4-5 (Dec. 1993), http://files.eric.ed.gov/fulltext/ED365085.pdf.

[34] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, Dear Colleague Letter on FAPE at 1 (Nov. 16, 2015) ("Dear Colleague Letter on FAPE") ("Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") (citing 80 Fed. Reg. at 50,776), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. *See generally* Thomas Hehir, *New Directions in Special Education: Eliminating Ableism in Policy and Practice* 18-39 (2005) ("Hehir, *New Directions*"). The Department has sponsored research that has tested the effectiveness of many such interventions; evidence-based tools and supports for teachers and families are available at https://ccrs.osepideasthatwork.org/.

to provide a FAPE. For example, research has shown that, to meet state academic standards for reading and prepare for adult life, deaf children should learn to use manual language, such as American Sign Language ("ASL"), from infancy – even before learning to read.[35] Depending on the level of impairment, students with visual impairments should be taught Braille or should receive accommodations such as large-print text;[36] these approaches can be used along

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[35] *See* Hehir, *New Directions* at 18-39; *see also* Ronnie B. Wilbur, *The Use of ASL to Support the Development of English and Literacy*, 5 J. Deaf Stud. & Deaf Educ. 81, 98 (2000) ("The research reviewed here provides strong support for the use of ASL as a medium of communication before a child enters school and continuing into the classroom to develop cognition, socialization, and an age-appropriate knowledge base, as well as providing a basis for learning English and English literacy."), http://jdsde.oxfordjournals.org/content/5/1/81.full.pdf; Shirin D. Antia et al., *Academic Status and Progress of Deaf and Hard-of-Hearing Students in General Education Classrooms*, 14 J. Deaf Stud. & Deaf Educ. 293, 308 (2009) (study finding that "communication measures" including "language ability" but also "skills such as using an interpreter, communication assertiveness, communication repair, and the ability to match communication mode and register to one's audience" were "significantly correlated to math, reading, and language/writing achievement"), http://jdsde.oxfordjournals.org/content/14/3/293.full.pdf+html; U.S. Dep't of Justice & U.S. Dep't of Educ., *Meeting the Communication Needs of Students with Hearing, Vision, or Speech Disabilities* at 2 (Nov. 12, 2014) ("*Meeting Communication Needs*") (listing interventions for students who are deaf or hard of hearing, including exchange of written materials, interpreters, note takers, real-time computer-aided transcription services (such as CART), assistive listening systems, accessible electronic and information technology, and open and closed captioning), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-parent-201411.pdf.

[36] *See Meeting Communication Needs*, *supra* note 35, at 2 (listing interventions for students with visual disabilities, including readers, taped texts, audio recordings, Braille materials

with technologies such as audio-supported reading to help students achieve proficiency.[37] Students with visual impairments may need orientation and mobility ("O&M") services, such as learning to walk with a cane, to achieve independence.[38] And students with

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and refreshable Braille displays, accessible e-book readers, screen reading software, magnification software, optical readers, secondary optical programs, and large-print materials); *see also* U.S. Dep't of Educ., Office of Special Educ. Programs, Dear Colleague Letter on Braille at 1, 6 (June 19, 2013) (noting that the 1997 amendments required schools to consider whether a student with a visual impairment should receive instruction in Braille and the use of Braille, and that "Braille is a very effective reading and writing medium for many blind and visually impaired persons, and research has shown that knowledge of Braille provides numerous tangible and intangible benefits"), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/braille dcl-6-19-13.pdf.

[37] *See* Nat'l Ctr. on Accessible Educ. Materials, Audio-Supported Reading ("Audio-supported reading . . . allows a user to listen to a spoken version of text while looking at screen-displayed print or touching braille. . . . With sufficient practice, both braille readers and magnified print readers can greatly increase the rate at which they move through text using [audio-supported reading]."), http://aem.cast.org/navigating/audio-supported-reading.html#.WCIdMI-cG70 (last visited Nov. 17, 2016).

[38] The Department's IDEA regulation specifies orientation and mobility services as a related service a school must provide to a student with a disability when necessary to provide FAPE, and defines it as "services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community." 34 C.F.R. § 300.34(c)(7)(i). *See* Jennifer L. Cmar et al., Council for Exceptional Children, *The Role of the Orientation and Mobility Specialist in Public Schools* 1 (2015) (citing studies and stating that "O&M skills allow children to interact with and move through environments purposefully and independently, and they facilitate access to educational, vocational, social, and recreational

other disabilities may also benefit from assistive technology devices, which the IDEA defines as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities" of a student with a disability. 20 U.S.C. § 1401(1)(A). For example, students with learning disabilities, intellectual disabilities, autism, and other disabilities may benefit from assistive technologies such as taped books, e-book readers, or word processing "spell check" programs to access instruction and demonstrate mastery of material on writing assignments and assessments.[39]

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opportunities") (citations omitted), *available at* http://community.cec.sped.org/dvi/resourcesportal/positionpapers.

[39] *See* Hehir, *New Directions* at 27-35; *see also* Nat'l Ctr. on Accessible Educ. Materials. Understanding DAISY (Digital Accessible Information SYstem) (readers with learning disabilities may find digital talking books "easier and more enjoyable to read and use than a print-based text"), http://aem.cast.org/creating/understanding-daisy.html#.WCIr7I-cG70 (last visited Nov. 17, 2016); U.S. Dep't of Educ., Office for Civil Rights. Frequently Asked Questions About the June 29, 2010, Dear Colleague Letter at 2, 7 (May 26, 2011) (stating that e-book readers may be needed by students with learning disabilities in public elementary and secondary schools who have difficulty getting information from printed sources, and that they provide "greater functionality" than audio books), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf; Louise Spear-Swerling, LD Online. *Spelling and Students with Learning Disabilities* (Dec. 2005) (recommending that older students be taught to use a computer spell-checker, which "can be enormously helpful to struggling spellers and writers, especially in the later grades when the volume of writing increases greatly"), http://www.ldonline.org/spearswerling/Spelling_and_Students_with_Learning_Disabilities; Julia K. Landau et al., LD Online, *Examples of Accommodations from State Assessment Policies* (listing word processor spell-check function as example of "response

Taken together, these methods show that schools can enable students with disabilities to improve their academic performance significantly, as demonstrated by their substantial gains in recent years. Schools, in short, and in comparison to when *Rowley* was decided in 1982, now have a variety of increasingly advanced educational methods and tools at their disposal, including intensive interventions in early childhood; robust accommodations to achieve progress in the general education curriculum and minimize the need to modify that curriculum; testing accommodations that mirror instructional accommodations; increasing learning time; and raising expectations for what constitutes success. As a result, students with disabilities may be expected to become proficient in the grade-level curriculum and to meet state academic standards.[40]

4. Educators have developed many interventions for students with ASD who may, like petitioner here, have behavioral challenges.[41]

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accommodation" in state academic assessments), http://www.ldonline.org/article/6187 (last visited Nov. 17, 2016).

[40] *See* Hehir, *New Directions* at 136-44. States are also improving the accessibility of achievement test items, such as adjusting format characteristics or content, or making test items more accessible and understandable (including by reducing unimportant or extraneous details) to better measure students' progress in learning grade-level content. *See* 80 Fed. Reg. at 50,775.

[41] *See* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *Summary of Autism Spectrum Disorders Research* at 1 (Oct. 2015) ("*Autism Spectrum Disorders Research*") (noting that ASD symptoms may vary in severity and may include social communication and interaction deficits; restrictive and repetitive behaviors, interests, and activities; intellectual impairment; sensory sensitivity; attention and execu-

Although children with ASD are very diverse, each with different strengths and sometimes complex needs, many children with ASD engage in challenging behavior because they have not developed functional communication skills or been given the tools to communicate effectively. Functional communication training ("FCT") helps students with ASD learn to avoid or replace those challenging behaviors, leading to better education outcomes.[42] Such training involves a school-based team, including the student's parents, the student, teachers, administrative staff, and specialists, coming together to conduct a functional behavior assessment to determine the function of problem behavior.[43] The team then identifies a communicative response that serves the same function as the problem behavior, and determines how and

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tive functioning problems, motor difficulties, and behavior problems), http://ies.ed.gov/ncser/pdf/ASD_2015.pdf.

[42] *See id.* at 2 ("social and communication skill impairments are core symptoms of ASD"); Robert C. Pennington & G. Rich Mancil, *Functional Communication Training, in* Darlene E. Perner & Monica E. Delano, Council for Exceptional Children, *A Guide to Teaching Students With Autism Spectrum Disorders* ch. 5 (2013) ("Pennington & Mancil, *Functional Communication Training*").

[43] *See* Pennington & Mancil, *Functional Communication Training*, *supra* note 42; *see also* G. Richmond Mancil, *Functional Communication Training: A Review of the Literature Related to Children with Autism*, 41 Educ. & Training in Developmental Disabilities 213, 214 (2006) (defining "functional communication training" as assessing the function of a behavior through functional behavior assessments and then replacing the challenging behavior with a communicative response that serves the same function), http://daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/2006v41_Journals/ETDD_200609v41n3p213-224_Functional_Communication_Training_A_Review_Literature_Related.pdf.

when the student will be taught the replacement response, as part of a behavior intervention plan.[44]

Other evidence-based behavioral interventions for students with ASD include preteaching, prompting, and positively reinforcing desired behavior. Teachers or peer students may also model desired behavior, or redirect the student from destructive behavior. Students may learn prelinguistic strategies (such as holding a favorite object) or cognitive-linguistic strategies (such as learning to use specific vocabulary to describe one's emotional state) to more effectively self-regulate behavior.[45] Sometimes, it is simply a matter of offering a student an opportunity to regroup from overwhelming outside stimuli.[46]

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[44] *See* Mancil, *Functional Communication Training*, 41 Educ. & Training in Developmental Disabilities at 214 (after replacing challenging behavior with a functional communicative response, "[t]he final step in FCT involves ignoring the challenging behavior" and "prompting and acknowledging the use of the communicative response that replaces the challenging behavior"). The requirement that schools perform a functional behavioral assessment and develop or revise a behavior intervention plan when a student with a disability is repeatedly suspended, or suspended or expelled for more than 10 days, was included in the IDEA as part of the 1997 amendments. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 93-94 (codified as amended at 20 U.S.C. § 1415(k)(1)). And the Department has recently clarified that schools must implement such approaches where needed to provide FAPE. *See infra* Part II.B.3.

[45] *See* Barry M. Prizant, Ph.D., et al., *The SCERTS Model: A Transactional, Family-Centered Approach to Enhancing Communication and Socioemotional Abilities of Children With Autism Spectrum Disorder*, 16 Infants & Young Children 296-316 (2003), http://journals.lww.com/iycjournal/Abstract/2003/10000/The_SCERTS_Model__A_Transactional,_Family_Centered.4.aspx.

[46] *See* Pennington & Mancil, *Functional Communication Training*, *supra* note 42; *see also* Cleveland Clinic, Behavioral Inter-

Public schools are regularly prescribing such interventions from a robust array of behavioral and other interventions for students with ASD. As a result, such students are accessing the general education curriculum and improving their academic performance.[47]

Even for the small number of students with ASD who have significant cognitive disabilities, schools are expected to – and can – provide extensive, direct individualized instruction and support. For these students, as for other students with intellectual or developmental disabilities, research has demonstrated that comprehensive reading instruction, through programs that emphasize phonological awareness and phonics skills, produce better outcomes than instruction that provides sight words alone.[48] Other research demonstrates that teaching students with moderate and severe intellectual disabilities specific math problem-solving interventions helps them learn

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vention for Children with Autism, http://my.clevelandclinic.org/childrens-hospital/specialties-services/departments-centers/center-for-autism/behavioral-intervention-autism (last visited Nov. 17, 2016).

[47] *See Autism Spectrum Disorders Research*, *supra* note 41, at 2-10; *see also* Wendy Machalicek et al., *A Review of School-Based Instructional Interventions for Students with Autism Spectrum Disorders*, 2 Research in Autism Spectrum Disorders 395-416 (2008) (evaluating research indicating effective methods in teaching students with ASD academic skills, communication skills, functional life skills, play, and social skills), http://www.meadowscenter.org/files/resources/RASD-Machalicek-08.pdf.

[48] *See Investment in Reading Research*, *supra* note 22, at 4. Students with intellectual disabilities may need such instruction for 2-3 years longer than for typically developing students to achieve basic levels of literacy. *See id.* at 4-5.

grade-level content in math.[49] The goal for these students, as for all students with disabilities, is to achieve measurable gains within challenging, grade-level state academic content standards, so that they are on track to pursue postsecondary education or competitive, integrated employment.[50]

II. THE EVOLVING LEGAL AND REGULATORY CONTEXT REFLECTS ADVANCES IN INSTRUCTIONAL PRACTICES

Education experts agree that a "free appropriate public education" must be "appropriate" so that each student with a disability, in light of current methods of instruction, can achieve the same challenging academic standards as students without disabilities. Educational standards must reflect the same high expectations for students with disabilities that we have for all students. Statutory and regulatory developments over the last two decades reflect that consensus.

A. The IDEA Requires a "Free Appropriate Public Education"

1. The IDEA requires an education that is appropriate to meet the child's unique needs and prepare the child for further education, employment, and independent living, through individualized special education and related services. *See* 20 U.S.C. § 1400(d)(1)(A).

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[49] *See What Have We Funded*, *supra* note 22, at 3-4.

[50] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 4-5; Notice of Proposed Rulemaking, *Title I – Improving the Academic Achievement of the Disadvantaged: Academic Assessments*, 81 Fed. Reg. 44,928, 44,953 (July 11, 2016) (proposed ESSA regulation developed through negotiated rulemaking, defining "students with the most significant cognitive disabilities").

A "free appropriate public education" must include "special education and related services" that "meet the standards of the State educational agency," in "an appropriate preschool, elementary school, or secondary school education in the State involved," and be "provided in conformity with [an] individualized education program" or IEP. *Id.* § 1401(9)).

An IEP must state "measureable annual goals" designed to enable the child to "be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs that result from the child's disability." *Id.* § 1414(d)(1)(A)(i)(II). The State must provide "the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable" to attain those goals. *Id.* § 1414(d)(1)(A)(i)(IV).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability." *Id.* § 1401(29). The Department has clarified that "specially designed instruction" must ensure that the child has access to the general education curriculum, so that the child "can meet the educational standards within the jurisdiction . . . that apply to all children." 34 C.F.R. § 300.39(b)(3).

2. The last time the Court addressed the "free appropriate public education" standard was in *Rowley* in 1982. In *Rowley*, this Court wrote that "the 'basic floor of opportunity' provided by [a FAPE] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201. The Court also clarified that the access to education must be "meaningful" and that a FAPE must be "personalized." *Id.* at 192,

202-03. The Court specifically noted that its holding should be limited to a student who, like Amy Rowley, meets grade-level expectations – and that it was not announcing a universal standard for educational attainment intended to prescribe what schools must do for all students with disabilities. *See id.* at 209-10 (noting that Amy Rowley "performs better than the average child in her class and is advancing easily from grade to grade").

B. The IDEA Has Changed in the 34 Years Since This Court Decided *Rowley*

The IDEA has changed since *Rowley*. Working in concert with the Department, Congress has made key amendments to the statute that further clarify the meaning of a FAPE for students with disabilities. In short, Congress has strengthened the statutory goal that children with disabilities achieve the same high standards as all children. To this end, Congress holds States and local school districts accountable, requiring them to support children with disabilities so that they can learn and become proficient in the grade-level academic content taught to all students. And Congress has indicated that educational and related services provided to students with disabilities should change and improve over time to incorporate new successful methods.

1. Congress's 1997 amendments to the IDEA added the requirement that students with disabilities have measurable goals that enable them to make progress in the general education curriculum. *See* Pub. L. No. 105-17, § 101, 11 Stat. 84 (IDEA § 614(d)(1)(A)(ii)). It also requires schools to describe how each student's progress toward those goals will be measured. *See id.*, 11 Stat. 85 (IDEA § 614(d)(1)(A)(viii)).

The 2004 amendments to the IDEA align the statute with the reauthorization of the Elementary and Secondary Education Act of 1965 ("ESEA") through the No Child Left Behind Act of 2001 ("NCLB"). As amended, the ESEA requires States to develop challenging academic content standards that apply to all students, and it established the expectation that all students, including students with disabilities, will be proficient under those standards. *See generally* 20 U.S.C. § 1412(a)(15), (16).

Most recently, the 2015 authorization of the ESEA through the Every Student Succeeds Act ("ESSA") retains the requirement that children with disabilities are held to the same challenging state academic content standards as are all students. *See id.* § 6311(b)(1). These standards must be aligned with the entrance requirements for public colleges and universities in each State. *See id.* § 6311(b)(1)(D)(i).[51]

2. Applying Congress's statutory framework, in recent years the Department has clarified how the IDEA must be aligned with the ESEA's high expectations for all students, including students with disabilities, and now holds States accountable for the achievement of students with disabilities.

The Department has clarified that, in order to provide a free appropriate public education, a student's IEP must be designed to enable the child to be involved in and make progress in the general education curriculum – the same curriculum for non-disabled children (based on the state academic

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[51] *See also* 20 U.S.C. § 6301 (ESSA's purpose is "to provide *all children* significant opportunity to receive *a fair, equitable, and high-quality education*, and to close educational achievement gaps") (emphases added).

content standards for the grade in which the child is enrolled).[52]

For all students with disabilities, schools must:

- Address the unique needs of the student related to the student's disability, by providing individualized special education and supportive related services;[53]
- Ensure the student's access to the general education curriculum (*i.e.*, the same curriculum as for non-disabled students), so that the student can meet the state academic standards that apply to all students in the State, for the grade in which the student is enrolled; and
- Prepare the student for college, career, and independence.[54]

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[52] *See* Dear Colleague Letter on FAPE, *supra* note 34 (summarizing the changes in the IDEA and the ESEA that support this statement of the law's requirements).

[53] In enacting the 2004 amendments to the IDEA, Congress acknowledged that, in addition to providing an education to students with disabilities that "conform[s] to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB," schools must also "include other goals that the IEP Team deemed appropriate for the student, such as life skills, self-advocacy, social skills, and desired post-school activities." S. Rep. No. 108-185, at 29 (2003), *quoted in* 80 Fed. Reg. at 50,779-80.

[54] As the Department has stated: "[P]ublic schools should prepare all children to be ready for college or the workforce. According to research . . . , nearly two-thirds of new jobs require some form of postsecondary education. Therefore, in order to compete in the 21st century, regardless of whether a student has a disability, some form of postsecondary training or education is increasingly important for the student to become a

For the very small number of students with the most significant cognitive disabilities, States may measure their performance against alternate academic achievement standards, which may vary in scope or complexity. But those standards still must be aligned with and clearly related to the State's grade-level content standards for the grade in which the student is enrolled. And the goal remains to put these students on track to pursue postsecondary education or competitive and integrated employment.[55]

In addition, for all students, where the student's academic performance is significantly below grade level, IEP goals should be ambitious but achievable. Thus, annual goals may not result in the child's achieving grade-level with a single year, but they should still be sufficiently ambitious to help close the gap.[56]

The Department has also clarified that – as the IDEA requires, *see* 20 U.S.C. § 1414(d)(3)(B)(i) – when a child's behavior impedes the child's learning or that of others, the IEP team must consider and,

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productive and contributing adult." 80 Fed. Reg. at 50,778 (citing Achieve, Inc., *The Future of the U.S. Workforce: Middle Skills Jobs and the Growing Importance of Post Secondary Education* (2012), http://www.achieve.org/files/MiddleSkillsJobs.pdf).

[55] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 4-5; *see also* Final Rule, *Title I – Improving the Academic Achievement of the Disadvantaged*, 68 Fed. Reg. 68,697, 68,704 (Dec. 9, 2003); 20 U.S.C. § 6311(b)(1)(E)(i) (authorizing States to adopt "alternate academic achievement standards," but requiring such alternate standards to be aligned with the State's "challenging . . . academic content standards" and to reflect "professional judgment as to the highest possible standards achievable by" students with most significant cognitive disabilities).

[56] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 5.

when necessary, include in the IEP the use of positive behavioral interventions and supports, and other strategies, to address that behavior. The goal, here again, is to address problematic behavior so that the child can be involved in and make progress in the general education curriculum and meet the State's challenging academic standards for all students.[57]

3. States and school districts understand that they will be held accountable for educating students with disabilities so that they can meet state academic standards. In particular, the Department announced in May 2014 that States would be measured on the performance of students with disabilities on state academic assessments and graduation rates. States now use these metrics to identify gaps in performance and implement targeted, systematic interventions in school districts where students with disabilities are not meeting state academic standards.[58]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[57] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities at 1, 4 (Aug. 1, 2016), http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

[58] *See* U.S. Dep't of Educ., Letter to Chief State School Officers at 1 (May 21, 2014), http://www2.ed.gov/about/offices/list/osers/osep/rda/050914rda-lette-to-chiefs-final.pdf.

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